1362

SUPREME COURT OF THE UNITED STATES.

No. 157.

JOHN W. BRITTAN, Appellant,

vs.

WM. A. BARNABY, Claimant of the Ship "Alboni."

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Libel,	1	3
Schedule "A,"	5	5
Schedule "B,"	6	6
Libellant's stipulation for costs,	7	6
Claim,	9	7
Claimant's stipulation for costs,	10	8
Bond,	12	9
Answer,	14	10
Monition,	17	12
Notes of testimony,	20	13
Commissioner's Report,	23	14
Decree,	25	15
Stipulation,	26	16
Notice of Appeal,	27	16
Consent,	28	17
Appeal,	29	17
Stipulation on Appeal,	32	18
Notes of testimony,	34	20
Clerk's certificate,	62	31
Certificate of Clerk of District Court,	63	32

	Original.	Print.
Notice of appearance,	64	32
Order for hearing,	65	33
Stipulation and original bill of lading,	66	33
Decree,	67	35
Consent,	68	35
Agreement as to evidence,	69	36
Notice of Appeal,	71	36
Citation,	74	38
Admission of service,	75	38
Clerk's certificate,	76	39

UNITED STATES OF AMERICA,
Northern District of California.

Before the Judges of the Circuit Court of the United States for the Districts of California, in and for the northern district thereof, at the court-house in the City of San Francisco, on the first day of September *of September* Term, in the year of our Lord one thousand eight hundred and fifty-six.

Witness the Hon. M. Hall McAllister and the Hon. Ogden Hoffman, Judges of said court.

Northern District of California, ss.

Be it remembered, that at the present September Term, in the year of our Lord one thousand eight hundred and fifty-six, before the Hon. M. Hall McAllister, one of the judges of the Circuit Court of the United States for the District of California, came John W. Brittan, appellant, by his proctors, Ely & Rankin, and brought into said court before the aforesaid Judge thereof, a certain transcript of record and appeal from the District Court of the United States for said Northern District of California, which said transcript of record and appeal, together with the clerk's certificate appended thereto, follows in these words, that is to say:—

In Admiralty.

U. S. DISTRICT COURT,
Northern District of California.

JOHN W. BRITTAN
vs.
The Ship "ALBONI," her tackle, &c.

Libel.

To the Hon. Ogden Hoffman, Jr., Judge of the United States District Court for the Northern District of California.

The libel of John W. Brittan, of the City of San Francisco, merchant, against the Ship "*Alboni,*" whereof one William A. Barnaby was and is master, her tackle, apparel, and furniture, and against all persons intervening for their interest, in a case of contract civil and maritime, alleges as follows, viz:—

That some time in the month of May, 1855, certain goods specified in Schedule "A," hereto annexed, and forming part of this libel, well shipped by one J. B. Jones on board of said vessel, then lying in the port of New York, and bound to the port of San Francisco, in good order and well conditioned, to be carried and transported in

said ship to the port of San Francisco, and delivered to the libellant in like good order and condition, for the sum of two hundred and forty-seven $\frac{12}{100}$ dollars, freight and primage to be paid by the libellant. Whereupon said master executed and delivered to said shipper a bill of lading for all said goods, which is hereto annexed, marked Schedule "B," and forming part of this libel. That the libellant is the lawful owner and holder of said bill of lading, and of the merchandise therein described.

2d. That said ship sailed from said port of New York with said goods and merchandise on board, and arrived at the port of San Francisco in this district on or about the twentieth day of October, 1855, where she now lies. That upon the arrival of said ship with said merchandise on board, in the port of San Francisco as aforesaid, the freight and all lawful charges upon said merchandise of the libellant was paid or offered to be paid, or tendered to the consignees or their authorized agents, when said merchandise was landed from said ship, amounting in all to the sum of two hundred and forty-seven dollars and twelve cents, and at the same time the libellant or his authorized agent demanded that said merchandise should be delivered to the libellant, was refused by said master, consignees or agents.

3d. That the goods and merchandise aforesaid, shipped on board said vessel, and the several articles and items thereof, are of the value and kind mentioned in said schedule "A," hereto annexed and forming part of this libel.

4th. That said libellant has been at all times willing and ready to receive and take said articles of merchandise referred to and named in said schedule "A," and is still ready, but that neither the said master, consignees, or owners of said vessel, nor any other person in their behalf, or on behalf of any other person, have delivered the same to the libellant, but have wholly refused so to do, and still refuses to deliver the same or any part thereof.

5th. That said merchandise last mentioned and still undelivered, is well worth the sum of four thousand six hundred and fourteen dollars and fifty-nine cents, less the freight, viz: the sum of \$247 $\frac{12}{100}$, leaving the net sum of four thousand three hundred and sixty-seven dollars and forty-five cents (\$4,367 45), which the libellant is entitled to receive from said vessel, with interest from the 2d day of November, 1855.

6th. That all and singular said premises are true and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

Wherefore the libellant prays that process in due form of law may issue against said ship, her tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Court will decree the payment of the value of said merchandise and costs of suit to the libellant, and that said ship, her tackle, apparel and

furniture, may be condemned and sold to pay the same, and that the libellant may have such other and further relief as may be proper in the premises.

J. W. BRITTAN.

Sworn this 2d November, 1855, before me,

W. H. CHEVERS,
Deputy Clerk.

ELY & RANKIN,
Proctor for Libellant.

ALEX. ELY,
Advocate.

Endorsed: Filed November 2, 1855.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Schedule "A."

The Ship "Alboni"

To J. W. Brittan, Dr.,
Importer of stoves, tin plate, iron, &c.,
58 and 60 Sacramento Street, near Front.

For the following merchandise, shipped by J. B. Jones, and consigned to J. W. Brittan, as per Bill Lading dated May 7, 1855, and marked S. B. J., viz:

30	boxes	tin plate	1 c.	@	$19 00	$570 00
20	"	do.	1 ×	"	20 00	400 00
50	"	roofing tin	1 c.	"	18 00	900 00
3	casks	zinc 9	3342 lbs.	"	14	467 88
3	pigs	tin	299 "	"	30	89 70
2	bundles	Russia iron	462 lbs.	@	30	138 60
10	"	wire 6 & 7	630 lbs.	@	10	63 00
30	do.	do. 8, 9, 10, 11	1890 lbs.	@	12½	236 25
55	do.	do. 12, 13, 14	3465 lbs.	@	14	485 10
5	do.	Eng. iron, 20 22 23	638 lbs.	@	8	51 04
20	do.	" " 24	2479 lbs.	@	9½	235 50
30	do.	" " 25 & 26	3711 lbs.	@	12½	463 88
35	do.	" " 27 & 28	4109 lbs.	@	12½	513 62
						$4614 57
		Less amount of freight as per Bill Lading				247 12
						$4367 45

210 *Schedule "B."*

[SEAL.] Shipped in good order and well conditioned, by J. B. Jones, on board the ship called the "Alboni," whereof Barnaby is master, now lying at the port of New York, and bound for San Francisco—To say:

	(90) ninety bundles sheet iron,		
	(100) one hundred boxes tin plate,		
S.—B. J.	(2) two bundles Russia iron,		
	(3) three casks zinc,		
	(3) three pigs tin,		
	(15) fifteen matts wire,		
	(1) one cask wire,		
17,625	@ ¾		$132 20
16,503	@ ⅝		103 15
			235 35
		Primage,	11 77
			$247 12

Being marked and numbered as in the margin, and are to be delivered in like good order and condition, at the aforesaid port of San Francisco (the danger of seas only excepted), unto J. W. Brittan, or to his assigns, he or they paying freight for the said as per margin, with 5 p. c. primage and average accustomed. In witness whereof, the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated in New York the 7th day of May, 1855.

W. A. BARNABY.

Endorsed: Filed November 2, 1855.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Libellant's Stipulation for Costs.

UNITED STATES OF AMERICA.

DISTRICT COURT OF THE UNITED STATES
for the Northern District of California.

Whereas, a libel was filed in this Court on the second day of November, in the year of our Lord one thousand eight hundred and fifty-five, by J. W. Brittan, against the ship "Alboni," for reasons

and causes in the said libel mentioned, and the said John W. Brittan and Rufus S. Eells and P. B. Clark, his sureties, parties hereto, hereby consenting and agreeing, that in case of default or contumacy on the part of the said libellant, or his sureties, execution may issue against their goods, chattels, and lands, for the sum of five hundred dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the undersigned shall be, and each of them is, bound in the sum of five hundred dollars, conditioned the libellant above named shall pay all costs and charges that may be awarded against them in any decree of this Court.

J. W. BRITTAN,
RUFUS S. EELLS,
P. B. CLARK.

Taken and acknowledged, this 2d day of November, 1855, before me,

W. H. CHEEVERS,
Deputy Clerk.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Rufus S. Eels and P. B. Clark, parties to the above stipulation, being duly sworn, do depose and say, each for himself, that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

RUFUS S. EELS,
P. B. CLARK.

Sworn to this 2d day of Nov., 1855, before me,

W. H. CHEVERS,
Deputy Clerk.

Claim.

U. S. DISTRICT COURT
for the Northern District of California.

JOHN W. BRITTAN
vs.
The Ship ALBONI, her tackle, &c.

Wm. A. Barnaby, master of the Ship Alboni, her tackle, &c., intervening for his interest in the said ship, her tackle, apparel and furniture, appears before this honorable court and claims the said ship, her tackle, apparel and furniture, and states that he is the master, and has the lawful right to the possession of said ship.

And thereupon the said claimant prays that this court may be

pleased to decree a restitution of the same to him, and otherwise right and justice to administer in the premises.

W. A. BARNABY.

Sworn to Nov. 5, 1855, before me,

W. H. CHEVERS,
Deputy Clerk.

Endorsed: Filed November 5, 1855.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Claimant's Stipulation for Costs.

UNITED STATES OF AMERICA.
DISTRICT COURT OF THE UNITED STATES
for the Northern District of California.

Whereas a libel was filed in this court on the second day of November, 1855, in the year of our Lord one thousand eight hundred and fifty-five, by J. W. Brittan against the ship "Alboni," for reasons and causes in the said libel mentioned, and whereas W. A. Barnaby has this day filed his claim herein as master of said ship, and the said W. A. Barnaby and Albert Dibblee and Chas. E. Lattimer, his sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said claimant or his sureties, execution may issue against their goods, chattels and lands for the sum of five hundred dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the undersigned shall be, and each of them is bound in the sum of five hundred dollars conditioned the claimant above named shall pay all costs and charges that may be awarded against them in any decree by this court.

W. A. BARNABY,
ALBERT DIBBLEE,
CHAS. E. LATIMER.

Taken and acknowledged this 5th day of November, 1855, before me,

W. H. CHEVERS,
Deputy Clerk.

Northern District of California, ss.

Albert Dibblee and Chas. E. Latimer, parties to the above stipulation, being duly sworn, do depose and say, each for himself, that he

is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ALBERT DIBBLEE,
CHAS. E. LATIMER.

Sworn to this 5th day of November, 1855, before me,

W. H. CHEVERS,
Deputy Clerk.

Endorsed: Filed the 5th day of November, 1855.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Bond.

Know all men by these presents, that we, W. A. Barnaby, principal, and Albert Dibblee and George Segar are held and firmly bound unto W. H. Richardson, Marshal of the United States for the Northern District of California, in the sum of eight thousand seven hundred and thirty-five dollars, lawful money of the United States of America, to be paid to the said W. H. Richardson, Marshal, &c., his successors, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals. Dated this third day of November, in the year of our Lord one thousand eight hundred and fifty-five.

Whereas, a libel has been filed in the District Court of the United States for the Northern District of California, on the second day of November, 1855, by John W. Brittan, against the ship or vessel Ship "Alboni," &c., in a certain action, &c., civil and maritime, for therein alleged to be due and owing to the said libellant, amounting to forty-three hundred and sixty-seven $\frac{45}{100}$ dollars.

The condition of this obligation is such that if the above bounden W. A. Barnaby and answer the decree of the court in such cause, then the above obligation to be void; otherwise to remain in full force and virtue.

W. A. BARNABY, [L. S.]
ALBERT DIBBLEE, [L. S.]
GEO. SEGAR. [L. S.]

Sealed and delivered in presence of

W. H. CHEVERS.

Northern District of California, ss.

Albert Dibblee and George Segar being duly sworn each for himself, says that he resides in San Francisco and that he is worth the

sum of eighty-seven hundred and thirty-five dollars over and above all his just debts and liabilities.

ALBERT DIBBLEE,
GEO. SEGAR.

Sworn before me this fifth day of November, 1855.

W. H. CHEVERS,
Deputy Clerk, Cl'k U.S. Dist. Court.

The Judge of the Northern District of the U. S. Court being absent and unable to act, this bond is, in pursuance of the law in such cases, duly approved.
Nov. 6, '55.

MILTON S. LATHAM,
Collector.

Endorsed: Filed November 6th, 1855.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy Clerk.

U. S. DISTRICT COURT,
Northern District of California.

In Admiralty.

JOHN W. BRITTAN
vs.
The SHIP "ALBONI," her tackle, &c.

Answer.

To the Hon. Ogden Hoffman, Junior, Judge, &c.

The answer of W. A. Barnaby, master of the said ship Alboni, intervening for his interest in the said ship, her tackle, apparel and furniture, to the libel of John W. Brittan, alleges as follows:—

First. The respondent admits the truth of the first article of said libel, except that he has no knowledge of the quantity or value of the several packages or bundles of goods referred to in said first article of said libel, and he denies that shedule "B," referred to and forming a part of said libel, is a true copy of the bill of lading executed by this respondent for said goods. And in that respect this respondent says, that said bill of lading contained a stipulation and condition that the freight on said goods should be paid before delivery, if required.

Second. In respect to the third article of said libel, this respondent denies that the freight and all lawful charges were either paid or offered to be paid, or tendered to the consignees or their agents when said merchandise was landed from said ship or at any other

time, and in that respect this respondent says, that on the arrival of said ship at the port of San Francisco notice was given to the said libellant of her arrival, and he was also notified to pay his freight on said merchandise to the consignee of said ship and receive said goods as they should be landed from said ship upon the wharf, and that if he should fail so to receive them by four o'clock of each day that such merchandise should be placed in a warehouse for sale keeping, at the expense of said libellant.

That said libellant neglected and refused to pay his freight and to receive said goods as they were landed from said ship, and that they were placed in a warehouse for safe keeping. That immediately after the said merchandise was landed and placed in store notice was given to the libellant of the same, and the said merchandise was ready for delivery on payment of freight.

And this respondent states that they are now, and ever since the arrival of said ship have been ready and willing to deliver the said merchandise according to the terms of said bill of lading; but that said libellant has always neglected and refused to comply therewith.

Third. This respondent does not admit the fact stated in the third article of said libel, and states that he has no knowledge upon which to form a belief.

Fourth. As to the fourth article of the said libel, this respondent denies the same and every part thereof, and avers the truth to be as stated in the answer to the first article of said libel.

Fifth. As to the fifth article of said libel, this respondent states that he has no knowledge upon which to found a belief, and therefore does not admit the same.

And this respondent prays that the said ship may be restored to him, and that the said libel may be dismissed, with costs to be paid by said libellant.

JULIUS K. ROSE,
Proctor for Respondent.

D. LAKE,
Advocate.

W. A. BARNABY.

Sworn to and subscribed before me, this 7th day of Nov., 1855.

W. H. CHEVERS,
Deputy Clerk.

Endorsed: Filed Nov. 7, 1855.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Northern District of California, ss:

[SEAL.] The President of the United States of America to the Marshal of the Northern District of California, greeting:

Monition.

Whereas, a libel hath been filed in the District Court of the United States for the Northern District of California, on the second day of November, in the year of our Lord one thousand eight hundred and fifty-five, by John W. Brittan, against the ship "Alboni," her tackle, apparel and furniture, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said ship or vessel, her tackle, &c., may be cited in general and special to answer the premises, and all proceedings being had that the said ship or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said ship or vessel, her tackle, &c., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court to be held in and for the Northern District of California, on the 13th day of November, inst., at eleven o'clock in the forenoon of the same day, if the same day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ. Witness, the Hon. Ogden Hoffman, Jr., Judge of said Court, at the City of San Francisco, in the Northern District of California, this second day of November, in the year of our Lord one thousand eight hundred and fifty-five, and of our Independence the eightieth.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

ELY & RANKIN,
Proctors for Libellants.

[Cr. $15.]

In obedience to the within monition, I attached the ship therein described, on the 2d day of November, and have given due notice to all persons claiming the same, that this Court will, on the 13th

day of November, inst. (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

W. H. RICHARDSON,
U. S. Marshal.

By J. E. TERRELL,
Deputy.

Dated November 2d, 1855.

Endorsed: Filed Nov. 13, 1855.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Notes of Testimony.

U. S. DISTRICT COURT.

JOHN W. BRITTAN
vs.
SHIP "ALBONI."

Notes of testimony taken before Jno. A. Monroe, U. S. Commissioner, March 14th, 1856.

Thomas H. Selby being duly sworn, deposes, and says: I am a merchant in the metal business, and acquainted with the value of goods of that kind on the 2d of November last.

$13.	J. O. Tin plate was worth cash			$19 00
15.	One X was worth			20 00
13.	Roofing tin 1 c was worth			18 00
10½.	Zinc	" "	14 c.	
45.	Tin	" "	40—45 c.	
30.	Russia iron	" "	30 c.	
9-10.	Wire 6 and 7	" "	10 c.	
12½.	8, 9, 10 & 11	" "	12½ c.	
12½.	12, 13, & 14	" "	14 c.	
8.	English iron, No. 20	"	8 c.	
8.	22, 23, 24	" "	9½ c.	
8.	25, 26	" "	12½ c.	
8.	27, 28	" "	12½ c.	

Cross-examined.

I speak of the San Francisco prices; don't remember the invoice being offered to me; have not inspected the articles. The market value would depend somewhat on the quality; as a general thing the larger the quantity the less the price. If the articles were good, they were worth the price. Those were the regular prices. We

were selling the same kind of goods at those prices any time up to the latter part of December.

Direct Examination resumed.

The marks mark the quality of the goods. I was selling these kind of goods at the prices I have named.

Re-cross-examination.

This depreciation in price has occurred since the termination of the combination of iron dealers, about three weeks since.

THOS. H. SELBY.

For Defence. April 8th, 1856.

Wm. McCann sworn, says: The market value of the three first items would have averaged 17 dollars per box. The three casks of zinc was worth 12 cents per pound, 3342 pounds in all. The three pigs of tin was worth 35 cents per pound; 2 bundles of Russia iron was worth 26 cents; three items of wire were worth 11 cents; English sheet-iron was worth 9 cents; 4 items. I am a metal broker, and am acquainted, and was at the time, with the market value. I refer to last October and first of November; my attention was called to it at the time with a view to this very bill.

Cross-examined.

Mr. Dempster about Oct. 30th, called my attention to the goods; I bought and sold goods of the kind at the time. I sold some to Mr. Brittan for M. Macondray. It may have been a week or ten days, but there was no change in the market. I sold zinc at 12 cents, and also sold tin plate. I inquired of Gordon and Brooks, and other dealers, the price of Russia iron. Mr. Brittan's prices are jobbing prices; all the prices I have spoken of are wholesale prices.

WM. McCANN.

It is admitted the goods sued for are the same goods mentioned in the libel.

Commissioner's Report.

DISTRICT COURT OF THE UNITED STATES
for the Northern District of California.

JOHN W. BRITTAN
vs.
SHIP ALPONI, her tackle, &c.

In pursuance of a decretal order made in the above entitled cause, on the day of February, in the year of our Lord one thousand eight hundred and fifty-six, by which among other things, it was referred to the undersigned, one of the commissioners of this

court, to ascertain and compute the amount claimed by the libellants in this cause, and to report thereon to this court with all convenient speed:

I, John A. Monroe, the Commissioner to whom the matter was referred, do report that I have been attended by the proctor for the libellant and respondent respectively, and have taken and examined the testimony offered in support of the libellant's claim, and have heard and taken testimony on the part of the respondent, and do find that the value of the goods claimed by the libellant in this cause is four thousand six hundred and fourteen dollars and fifty-seven cents (4614.57), the same as mentioned and claimed in the libel, together with the interest thereon—after deducting two hundred and forty-seven dollars twelve cents of freight money for said goods.

Dated San Francisco, April 15, 1856.

All which respectfully submitted.

JOHN A. MONROE,
U. S. Commissioner.

In all amounting to $\$4{,}508\frac{64}{100}$.

Endorsed: Filed the 15 day of April, 1856.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Decree.

At a stated term of the District Court of the United States of America for the Northern District of California, held at the Court House in the City of San Francisco on Friday, the 18th day of April, in the year of our Lord one thousand eight hundred and fifty-six: Present, The Hon. Ogden Hoffman, Jr., Dist. Judge.

JOHN W. BRITTAN
vs.
SHIP "ALBONI."

This cause coming on to be heard on the pleadings and proofs and having been argued by the advocates for the respective parties, and due deliberation being had in the premises, it is ordered, adjudged and decreed by the court that the libel of the said libellant be dismissed and it is further ordered, adjudged and decreed by the Court that the claimants of the said ship "Alboni," &c. recover in this suit of the said libellant their costs, to be taxed, and that execution issue therefor.

OGDEN HOFFMAN, JR.,
U. S. Dist. Judge.

Filed April 18, 1856.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Stipulation.

In Admiralty.

U. S DISTRICT COURT,
Northern District of California.

JOHN W. BRITTAN
vs.
SHIP "ALBONI," her tackle, &c.

It is hereby stipulated and agreed by and between the proctors for the libellant and respondents respectively, that the report of the commissioner filed in this case be embodied in the appeal record, and the same to be read and considered as testimony in the cause as if the same had been taken by the Court.

ELY & RANKIN,
Proctors for Libellants.

JULIUS K. ROSE,
Proc. for Respond.

Endorsed: Filed April 23, 1856.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Notice of Appeal.

DISTRICT COURT OF THE UNITED STATES
for the Northern District of California.

JOHN W. BRITTAN
vs.
The SHIP ALBONI, her tackle, apparel, &c.

Sir: The libellant in this case intends to appeal from the final decree of the Court in this cause.

San Francisco, April, 1856.

ELY & RANKIN,
Proctors for Libellant.

To John A. Monroe Esq., Clerk.

Endorsed: Filed April 18, 1856.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Consent.

In Admiralty.

U. S. DISTRICT COURT,
N. District of California.

JOHN W. BRITTAN
vs.
SHIP "ALBONI," her tackle, &c.

Consent for further time to file stipulation on appeal.

I hereby consent that the said libellant may have ten days further time from this date to give security for damages and costs, on appeal in this cause, and that in the meantime the execution of the decree in favor of said claimant be stayed.

Dated 26 April, 1856.

J. K. ROSE,
Proctor for Claimant.

Endorsed: Filed April 26, 1856.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Appeal.

CIRCUIT COURT OF THE UNITED STATES,
Northern District of California.

JOHN W. BRITTAN, Appellant,
v.
WILLIAM A. BARNABY, Claimant of ship "Alboni," her tackle, &c., Appellee.

Appeal from U. S. District Court.

To the Honorable the Circuit Court of the United States for the Northern District of California, in the Circuit.

The appeal of the above named appellant respectfully showeth:

That on or about the second day of November, 1855, the above named John W. Brittan exhibited his libel in the District Court of the United States in Admiralty for the Northern District of California against the ship "Alboni," her tackle, &c., all persons claiming any interest in the same, claiming over fifty dollars, and praying among other things, for the reasons set forth in said libel, that said ship, her tackle, apparel, and furniture, might be condemned and sold to pay the demands of said libellant, and costs in said libel mentioned.

That process issued out of said Court against said vessel, whereupon said claimant having duly appeared and answered, said cause was tried before said Court on the 25th, 26th, and 28th days of

February, 1856, and a decree rendered by said Court the eighteenth day of April, 1856, in said cause, whereby it was among other things sentenced and decreed that said libel be dismissed, which said decree of said District Court, as this appellant is advised, is erroneous, and ought to be reversed.

And this appellant, for this and other reasons, appeals from the whole of said decree in favor of said ship and claimant, William A. Barnaby, to the next Circuit Court to be held in said district, and on the said appeal he intends to have said cause heard anew in the Circuit Court, on the pleadings and proofs in the District Court and other proofs to be introduced in the said Circuit Court, and he prays that the record and proceedings may be returned to the said Circuit Court, and that said decree may be reversed, or such other decree thereon to be made as to said Circuit Court shall seem just, and that the appellee may be condemned to pay the appellant his costs and damages in the premises.

Dated San Francisco, 25th April, 1856.

ELY & RANKIN,
Proctors.
ALEXANDER ELY,
Advocate.

Northern District of California, ss.

Robert Rankin, of the city of San Francisco, one of the Proctors for appellant, being duly sworn, says that on the 26th day of April, 1856, he served a copy of the foregoing appeal on Julius K. Rose, Esq., Proctor of the Appellee above named, by leaving the same in his office with the person in charge thereof, viz.: Delos Lake, Esq., one of his partners in business. ROBERT RANKIN.

Sworn this 26th April, 1856, before me,

W. H. CHEVERS,
Deputy Clerk.

Endorsed: Filed April 26, 1856.

By W. H. CHEVERS,
Deputy Clerk.

In Admiralty.

U. S. DISTRICT COURT,
Northern District of California.

Stipulation on Appeal.

JOHN W. BRITTAN
v.
SHIP "ALBONI," her tackle, &c.

Stipulation for damages and costs on appeal.

Whereas an appeal has been taken from the decree of the Court made on the eighteenth day of April, in the year eighteen hundred

and fifty-six, in a certain cause wherein John W. Brittan is libellant, against the ship "Alboni," her tackle, &c., and William A. Barnaby, claimant, by the said libellant.

Now, therefore, the stipulators undersigned hereby stipulate in the sum of fifteen hundred dollars, to pay all damages and costs which shall be awarded against the said appellant by the final decree rendered by the appellant Court and in the Supreme Court, in case an appeal shall intervene.

J. W. BRITTAN,
HIRAM W. BEEBEE,
JNO. M. EASTERLY.

Taken and acknowledged this 30th day of April, 1856, before me.

By W. H. CHEVERS,
Deputy Clerk U. S. Dist. Court N. D. of Cal.

Northern District of California, ss.

John M. Easterly and Hiram W. Beebee, parties to the above stipulation, being duly sworn, say each for himself that they are severally and respectively worth the sum of three thousand dollars over and above all his just debts and liabilities.

HIRAM W. BEEBEE,
JNO. M. EASTERLY.

Sworn to this 30th day of April, 1856, before me.

W. H. CHEVERS,
Deputy Clerk U. S. Dist. Court Nor. Dist. of Cal.

I hereby accept and approve the foregoing as a good and sufficient stipulation on appeal in this cause.

Dated 30th April, 1856.

OGDEN HOFFMAN, JR.,
U. S. Dist. Judge.

Endorsed: Filed April 30, 1856.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

Statement of Testimony.

In Admiralty.

UNITED STATES DISTRICT COURT,
Northern District of California.

JOHN W. BRITTAN
v.
SHIP "ALBONI," her tackle, &c.

Statement of Testimony in District Court.

Statement of Testimony on Trial.

Tennis Van Vechten, a witness produced and sworn on behalf of libellant, testifies as follows, viz: I am bookkeeper for libellant, and have been for five months. I was his bookkeeper in October last (1855). I saw the goods mentioned in the bill of lading, as they were landed. I was at the ship every day. The first day there were seventy-nine (79) boxes of tin. I made the memoranda every day as I visited the ship.

The witness read from memorandum as follows:—

Goods discharged	24th	October,	79 boxes of tin
"	25	"	2 bundles Russia iron
"	"	"	15 mats of wire
"	"	"	1 cask of wire
"	"	"	3 " of zinc
"	"	"	2 pigs of tin
"	"	"	1 box of tin
"	26	"	18 boxes of tin
"	27	"	90 bundles of sheet iron
"	"	"	1 pig of tin
"	"	"	2 boxes of tin.

These goods were marked as on bill of lading. I offered to pay the freight on the goods that were out, to Mr. Dempster, the consignee. He referred me to the office. The bookkeeper declined to give me an order unless I paid the whole freight due. This was on the 24th October. I told them that there were 79 boxes of tin on the wharf, and that I desired to pay the freight on them. I had the money with me. The delivery clerk said he had no authority to deliver without an order. At the office I saw Mr. Davenport, the cashier. Told him I had come to pay the freight on 79 boxes of tin, naming the mark, consigned to J. W. Brittan, and desired an order, or that he should deliver the same. He asked if I were ready to pay all the freight as called for by the bill of lading. I told him that I came to pay the freight on the goods that were out. He said he could not give me an order, that he was not authorized to do so. I returned the same day after the vessel had ceased discharging.

Saw Mr. Dempster. Mr. Brittan went with me, and made the same offer as I had done. Mr. Dempster said he would deliver all the goods if they were out, and if they were not out he could not deliver. Mr. Brittan said he was willing to pay freight on the goods that were out: I had the money with me, $250. I tendered the money in United States gold coin. On the 25th October I made the demand of Mr. Davenport after the ship had ceased discharging. I told what goods were out, and that they were on the wharf. I tendered the amount due for those goods. He said he could not deliver the goods, or any portion of them, unless the whole freight on the bill of lading was paid. The same thing was repeated every day while our goods were coming out. On the last day, after all were out, I tendered the entire amount of freight called for by the bill of lading. I demanded an order. Mr. Davenport said he could not give me a free order for the goods. It would be subject to the charge for storage and cartage. This last tender of the whole freight was on the 27th October. I am sure it was on the day when the last goods came out. On the receipt of the note from D. L. Ross & Co. I took a bill of the goods to Mr. Dempster. This invoice (attached to the libel) is an invoice of the goods.

Cross-examination.

There were other bills of lading to Mr. Brittan by the same vessel. The freight was paid and the goods delivered. Mr. Dempster only required the freight on that bill of lading. I paid the freight in advance on those bills of lading, as he wanted us to pay this.

Direct Examination resumed.

These goods were sold, and it would have been a great loss to us if we had not got them.

A. D. McGowan, a witness produced and sworn on behalf of libellant, testified as follows: I saw those goods mentioned in the bill of lading. I am clerk in Brittan's store. Have been for 3 years. My business is attending to the receipt and delivery of goods. I superintended the receipt of goods. I saw these goods (in schedule attached to libel) as they came out. There were 100 boxes of tin of different weights. The boxes were marked S. B. J. in a diamond. The size of the tins in these boxes was 10 inches by 14, and 14 by 20. The latter is roofing tin. There were 50 boxes of roofing tin. It was marked J. C.

Thomas Davenport, a witness produced and sworn on behalf of claimant, testified as follows, viz: I am bookkeeper for D. L. Ross & Co. The first conversation I had with Mr. Van Vechten was on the 23d October. He tendered a portion of the freight due on a bill of lading. I told him I could not accept a portion of the freight

due on a bill of lading. I told him I could not depart from the custom here to receive freight in advance. We have collected freight uniformly in this way. We have collected $1,000,000 in this way. It is the usual custom here. To ascertain what amount is due on each parcel, we would have to measure all the goods. This was a general ship. There were 300 consignees of goods. On the arrival of the ship, we advertise for consignees, to pay freight and get their goods, and that at five o'clock each day they will be stored at the consignees' risk and expense. The wharfinger will not allow the goods to remain, except sometimes heavy goods like millstones, &c. The wharf charges toll, which is paid by the consignee of the goods.

Cross-examination.

I have been three years in San Francisco. The weighing of goods would be the only inconvenience. I can only speak of the custom of our own house. This exaction of freight in advance was never disputed except in this and one other instance. Mr. Brittan has frequently had goods by our ships. He has always paid in advance without any demur.

William H. Talmage, produced and sworn on behalf of claimant, testified as follows, viz.: I am a commission and shipping merchant. Freight is almost always paid in advance. The custom is to pay the freight on receipt of the delivery order. If the goods in a Bill of Lading were measured separately and *pro rata*, it would be very inconvenient. They generally pay me in advance.

Cross-examination.

I have delivered to three parties without receiving freight money. Could not weigh the goods as discharged unless we had two gangs of men. Each article is weighed or measured separately in New York. Where there are several boxes or bundles, one is taken as a sample. You can weigh and measure a cargo here more rapidly than in New York. It would lead to enormous expense to weigh each separately. The cargo book is usually sent on : to us at least.

C. J. Dempster, a witness produced and sworn on behalf of the Claimant, testified as follows, viz.: I am a member of D. L. Ross & Co. The custom is to advertise and have consignees pay in advance. Only two instances where objections have been made. Have collected between one and two millions. It would be utterly impracticable to collect the freight separately. In such case we would refuse consignments. A ship could not deliver one-fifth as many goods as now. I never heard the custom questioned. The average time of discharging clipper ships is from eight to fourteen days. The consignee of goods always pays the storage.

Henry Carlton, Jr., produced and sworn on behalf of claimant,

testified as follows, viz.: I am a commission merchant of the firm of Wm. S. Coleman & Co. The custom is to pay freight before delivery order is given and the goods are taken as they come to hand. There would be much inconvenience in measuring as the goods come out. The expense of measuring would be less than cartage and storage. The present rate for those charges is $2.50 per ton or 40 feet. I have not known consignees object to this. We have delivered sometimes without payment of freight, but this was as a matter of accommodation. In New York the goods are generally delivered before payment of freight if we know the party. Otherwise the master requires security, and if it be not given we store the goods as they come out, at his expense.

Cross-examination.

I have received part of the freight and delivered part of the goods. It is impracticable to store the contents of a Bill of Lading all together. If vessels were loaded in that way, you could not half fill them.

O. A. Reynolds, produced and sworn on behalf of Claimant, testified: I am a commission merchant, of the firm of Brigham & Reynolds. Freight is generally paid in advance. The consignee pays storage.

Cross-examination.

We have sometimes given an order without payment of freight in advance. It is merely as a matter of accommodation. Have done it perhaps half a dozen times. Have not known it demanded as a right. We never took a portion of the freight on a single Bill of Lading.

Edward P. Flint, produced and sworn on behalf of Claimant, testified: I am one of the firm of Flint, Peabody & Co. Freight is always paid in advance. When goods are stored the consignee pays storage. We never give orders without payment of freight. We sometimes take checks, but agree not to present them. People have sometimes said they could force us to deliver on payment of part freight.

Charles L. Case, produced and sworn on behalf of Claimant, testified: I am one of the firm of Case, Heiser & Co. Freight is always paid in advance, and if the goods are stored the consignee of the goods pays the storage. They pay freight and we give them an order. There are no exceptions to this rule.

J. G. Kittle, produced and sworn on behalf of Claimant, testified: I am a commission merchant of the firm of De Witt & Harrison.

Consignees by custom pay freight and take an order. If the goods are stored the consignee of the goods pays the storage.

Cross-examination.

I do not think there are any exceptions to this rule. Sometimes the consignees of ships take checks as security, not to be presented without notice. On an average, two-thirds of the freight money are paid on the first day.

John Richardson, produced and sworn on behalf of Claimant, testified: I am clerk to D. L. Ross & Co., consignees of the ship "Alboni." I have been a delivery clerk. It would be next to impossible to divide up Bills of Lading.

Cross-examination.

I have been a delivery clerk eight months. It takes about thirty days to load a ship. You cannot keep a ship as long as that.

Albert Dibblee, produced and sworn on behalf of claimant, testified: I am of the firm of Crosby & Dibblee. The custom is to pay freight in advance before delivery of goods. They pay freight, take an order, and receive their goods as they come to hand.

Cross-examination.

We never delivered in any other way, except as a favor. If the goods are stored, the consignee of the goods pays the storage.

H. P. Hutchings, called by claimant, testified as follows: I am of the firm of Sweetzer, Hutchings & Co. The custom is to pay freight in advance, before delivery. If the goods are stored, consignee pays storage.

Cross-examination.

They generally come after freight as soon as the ship arrives. We have had one-fourth of the freight paid before a package was discharged. I have sometimes given orders for goods before payment of freight, once or oftener by every ship. It was never demanded as a right, but for want of money.

E. P. Flint, recalled by claimant, testified as follows: The delay to ships, if goods were measured as they came out, would be from 30 to 60 days. It would require a great number of memorandum clerks. Beside the weighers and measurers, there would have to be a great many clerks to compute the amount of freight; to give and take receipts. It would be almost an impossibility. It would increase the labor a thousand-fold.

J. B. Thomas, called by claimant, testified as follows: The cus-

tom is to pay freight in advance, before delivery of goods, and the expense of storage is borne by the consignee of the goods. I was formerly a ship-master. I think it would require about one-fourth more time to discharge a cargo, if it were all measured or weighed as it came out.

Henry Carlton, Jr., recalled by claimant, testified as follows: It would be very inconvenient to measure the goods. It would take twice as long to discharge, perhaps three times.

Cross-examined.

You could not discharge more than four or five hours a day.

C. J. Dempster, recalled by claimant, testified as follows: It is no more trouble to measure here than in New York, but the measuring and delivering would make the difficulty.

Teunis Van Vechten, recalled by libellant, testified as follows: I had the whole amount of freight money due when I made the tender. I made the calculation at the rate of three-fourths of one cent per pound, which was the highest amount charged.

Cross-examination.

I do not know on what portion the three-fourths of one cent were charged, or on what one-half was charged. The bill of lading contains nothing to enable me to discriminate.

Amos Noyes, called by claimant, testified as follows: I am a port warden. It would be almost impossible to divide up the bills of lading. The ships are very large, with a variety of goods, such as do not come to other ports.

R. C. Eldridge, called by libellant, testified as follows: I am a commission merchant. I have generally pursued the customs of the port here; advertised and requested them to pay freight and take their orders. A controversy arose about it once. I offered in that case to receive the freight on the goods as they came out. I always considered that the ship was not entitled to receive freight until she was ready to deliver. I have known of part payment and delivery in New York when the master refused to deliver till payment of full freight. The consignee offered to pay *pro rata;* the master refused and stored the goods, and the ship finally had to pay the storage. As a consignee of ships, I should consider myself obliged to deliver *pro rata* on offer of freight *pro rata.*

George Weller, called by libellant, testified as follows: I have been a discharging clerk; have measured goods to ascertain the

amount of freight due. It was for Mr. Brittan, in case of the ship "Hornet," consigned to Case, Heiser & Co.

Cross-examined.

This was the whole bill of lading.

James Gordon, called by libellant, testified as follows: I am a drayman. I have seen freight paid for goods on the wharf in one instance. They measured the goods. I did not read the bill of lading. Don't know whether there was one or more.

Rufus Eells, called by libellant, testified as follows: I am constantly in the receipt of goods. I never pay freight until I know that part of the goods are on the wharf. My goods usually come out first. I wait to see enough to make it worth my while to pay. I usually give my check, but it does not go to the bank until I get all my goods. It is usual to ask a check or due bill. Several years ago I insisted, with Case, Heiser & Co., on my right to take my goods as they came out. They said they would not deliver them separately. They kept my goods between decks sometimes until we compromised it. I told them they could not store the goods at my expense. They finally conceded it. Ritchie, Osgood & Co. also yielded the point. I have frequently claimed it as a right to pay for part of the goods as delivered. In this dispute with Case, Heiser & Co., I claimed the right. The consignees took the money. Don't know whether they considered it a right or favor. In almost every case I have given either a check or a due bill for the whole amount, or else have paid cash for the goods that had come out.

B. R. Prevost, called for the libellant, testified as follows: I am agent for Wells & Prevost, of New York. Am in the habit of receiving goods. As a general thing I have paid freight as the ships arrive; but not always. The consignees have in some instances proposed to me to pay as the goods are delivered. Hussey, Bond & Hale proposed it to me. I refused it. They afterwards wanted me to take the goods from the wharf and pay for what was ready. Finally I agreed to do so. We went down and estimated the quantity. They afterwards gave me an order for the balance of the goods without paying freight. I have also received goods from Beck & Elam without paying freight. Made the same demand of Ritchie, Osgood & Co., and they gave me the goods before payment. In general, this demand for freight in advance is submitted to to avoid lawsuits and difficulties (also to get the goods), and not because the right is conceded. There is no particular custom here as to payment and delivery.

Cross-examination.

I derive this from what has been told me. To come to the right of it, I suppose we are not bound to pay until all are ready. I have sometimes consented to take part and pay part, but it was to accommodate the consignees of the ship.

H. P. Hutchings, recalled by libellant, testified as follows: I have never received *pro rata* freight. Have frequently had goods consigned. Did not always pay in advance. In one instance I refused to pay for a whole invoice. My goods were put into a store. I subsequently procured them. Did not pay one dollar of storage. There would have been a lawsuit if this had not been done. I should think two men could measure as fast as ten men could discharge, and one man might make the calculations. Sometimes clippers have loaded as quick as they discharge here. The Water Witch, I have heard, loaded 2100 tons in 7 days; the Charmer 2000 tons in 9 days. The Water Witch took 11 days to discharge from one hatch. In case I knew the parties, I should prefer to trust them for freight. If the consignee had offered freight *pro rata* and the goods had been sent to the public store, I should let him have them free of storage. I would do this to avoid difficulty, and because I thought it the shipper's right.

Cross-examination.

I forget the name of the ship which had my goods. In 1853, ships loaded in four to nine days. I don't know whether the goods in the vessels I have spoken of had been first measured and put in the warehouse. The Charmer was not loaded with goods stored and measured. That might have been the case with vessels loaded in four days. I never knew any other case where the payment of storage was refused. I have heard of several cases. I don't suppose that the usage to pay freight in advance is as well understood and generally acquiesced in as three days grace on a note.

Edward P. Flint, recalled by libellant, testified as follows: The average time of loading is between eight and ten days.

Cross-examination.

I speak of our line. I should think that in New York the average time is 20 days. The usage is perfectly established. It is notorious among consignees of goods and consignees of ships.

Henry Carlton, Jr., called by libellant, testified as follows: I have never received freight *pro rata*. On an average about two shippers by every ship consigned to us get their goods without payment of freight in advance. They were generally the same parties. If the goods are sent to the public store, the consignee of the goods always

pays the storage. If a consignee were to offer me freight *pro rata*, I should take it.

Cross-examination.

The gentlemen who have testified here are all very large receivers of ships. They probably receive nine-tenths of all the ships sent here. I do not know that this practice is of any benefit to us, except as a matter of convenience. If we did not collect in advance, we should charge five per cent. instead of two and a half. It is well understood at home that the freight is to be paid in advance. Every bill of lading is stamped, with very few exceptions. Some bills of lading read "freight payable on delivery." This is the case with shipments of coal. In such cases we are not responsible for the freight. When it is expressly said that "freight is payable on delivery," I consider it is not payable in advance. On the ordinary bill, "he or they paying freight for the same," the freight is payable in advance. Such is the general custom. I never heard it doubted till I came here.

A. B. Southworth, called by libellant, testified as follows: I am a hardware merchant. We receive a great many goods. We sometimes pay freight in advance, sometimes not. We generally pay when the goods are coming out. We have a drayman on the lookout, and when our goods begin to come out we get an order. I have never paid *pro rata* freight, although I have come very near it sometimes. Flint, Peabody & Co. allowed me to take goods on payment of part of the freight, which was endorsed on the bill of lading. This was in 1853. In 1852 I paid the Golden Age part of the freight. In that case, after one part payment, they gave me the order for the whole, after some dispute. This was the firm of Case, Heiser & Co. The same thing happened with the Queen of Clippers, in 1853; and with the Invincible, consigned to George W. Shaw. The position that I have always taken is that they had no right to freight any faster than they were ready to deliver. The general opinion, so far as I know, is, that the consignees of ships have no right to have freight paid in advance; that it is extortionate; and that it is acquiesced in to save trouble.

Cross-examination.

Within the last few years there has not been much trouble about it. The consignments are not so large nowadays. I have been receiving goods during the last two years. There has been no contention. I have always contended for a notice, and that they are bound to let me know that my goods are ready.

Gabriel Winter, called by libellant, testified as follows: I was a merchant in San Francisco from 1849 to spring of 1853. I generally paid on delivery, that is, proportionately as they were ready.

1376.

Cross-examination.

The goods were then landed in lighters. The attempt was made by consignees to establish the custom of collecting freight in advance. Some paid in advance and some did not. This was in 1850, and the same has been the case ever since. It was customary to exact it in 1851. It was paid by some and objected to by others. Those who had been in the habit of paying in advance submitted; others resisted. The practice of putting stamps on the bills of lading had begun to prevail.

J. R. Rollinson, called for libellant, testified as follows: I have been a merchant in San Francisco for the last six years. I receive goods by ships from the Eastern States; have also had goods consigned to me. I occasionally pay freight in advance. Sometimes receive goods without paying freight. I received goods to-day in that way—it was coal; 100 tons had been discharged, on which I paid freight, and they gave me an order for the whole 300 tons. The bill of lading had the usual stamp, "Freight payable before delivery." This frequently happens to me, for I am well known, and they would give me an order when they would not do it for other people. Consignees of goods generally claim the right to have their goods discharged on the wharf before freight is paid, but they seldom insist on it. I have known it insisted on by a large house here, who themselves received consignments of ships, and who claimed the right to have freight paid in advance; this was in 1851. I do not regard the red ink stamp as binding on the shipper. If the freight were "payable before delivery," I could not ask for it until the goods were ready for delivery. I do not remember having paid freight *pro rata*. I have frequently delivered goods without prepayment.

Cross-examination.

The consignees are familiar with the fact that the stamp is put on with the view of enforcing this right; but they do not regard it as binding. We have never considered it as a right to collect freight in advance, but we acquiesce in it as the easiest way of getting along. I get orders from D. L. Ross & Co. on telling them I will pay before steamer day. It is the custom to pay in advance, but it is not universal. The right is not conceded. It arose when consignees were unknown, and there were few merchants here. I think I should be obliged to receive freight *pro rata*—no great inconvenience would result from the practice. In many cases goods are delivered to responsible houses without prepayment of freight. It is always granted when asked by a responsible house. I consider Mr. Brittan A No. 1 as a merchant of high standing and perfectly responsible.

Thomas H. Selby, called by libellant, testified as follows: I am a

merchant, and receive large consignments of goods. We generally pay as the goods come out, and before we receive them. The drayman watches at the ship and notifies us when our goods come out, and the bookkeeper draws a check. We have never conceded the right to collect freight in advance. We have received a lot of goods before paying freight. We import about $400,000 worth of goods per annum.

Cross-examination.

I never asked them to wait for freight but once. I have talked with many merchants, and we all agreed that if it were contested, they would find that they had no right to collect freight in advance. I think the ship should pay the storage. Mr. Brittan's standing is No. 1.

Henry M. Hale, called by libellant, testified as follows: I should consider that as a matter of right and custom combined, the consignee of the ship has no right to ask for his freight until the goods are on the wharf ready for delivery. We have had many ships consigned to us.

Cross-examination.

It is undoubtedly the custom to prepay freght if consignees are a little flush; but it is also very generally the practice to give an order for a portion of the goods on receiving a part of the freight. I have myself always paid in advance, but I know that consignees of goods claimed that there was no right to exact it in advance. I have considered it the right of the consignee to have the goods as discharged on the wharf, if he pays freight on them as they come out, provided the remaining goods afforded an adequate security. Part payments are very often made, but I should say it was the exception.

R. C. Eldridge, recalled by libellant, testified as follows: In the case alluded to on my previous examination I offered to receive the freight *pro rata.*

L. L. Treadwell, called by libellant, testified as follows: I am a merchant, and receive large amounts of goods. My practice is to notify the carman that I have goods, and he brings them up. I generally pay in advance, but I do it because I am satisfied that my goods are carefully measured at Boston, and Flint, Peabody & Co. are ready to pay any proper reclamation. But I have always opposed this practice, and I deny that it is a usage of this port. My neighbors dispute the custom. They feared that what had been adopted from expediency might grow into a custom, contrary to the usages of all commercial and Christian countries.

James Freeborn, called by libellant, testified as follows: I have

been purser of a ship; have had experience in discharging. I think a man could measure all the goods that come out of one hatchway.

Cross-examination.

I have no practice in discharging clipper ships, but I have been about the docks a good deal.

Bradford B. Williams, called for libellant, testified as follows: I have commanded packets and ships generally for a great number of years. In New York, goods are delivered into carts on the wharf. They have duplicate cargo books and deliver one man's goods at once. A cargo could be weighed with perfect facility as fast as it came out. These things are very easy when labor is systematized.

C. J. Dempster, recalled by claimant, testified as follows: I have known libellant two years, consider him good. After the libel was filed I called on Mr. Brittan and offered to give him the goods if he would give us a bond to abide the result of the suit.

It is hereby stipulated and agreed, that the foregoing statement be and the same is hereby settled as the testimony given on the trial of this cause before the District Court aforesaid, and that the same be filed and attached to the record on appeal to be transmitted to the Circuit Court, and shall form part of the same.

ELY & RANKIN,
Proctors for Libellant.
J. K. ROSE,
Proctor for Claimant.

Clerk's Certificate.

I, John A. Monroe, clerk of the District Court of the United States of America for the Northern District of California, do here by certify the foregoing pages, from one to sixty-one inclusive, to be a transcript of the record of the said District Court, in the cause named at the beginning hereof, made up pursuant to Admiralty rule No. 53, December term, 1854, of the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court, this first day of July, in the year of our Lord one thousand eight hundred and fifty-six, and of our Independence the eighty-first.

[SEAL.] JOHN A. MONROE,
Clerk.
By W. H. CHEVERS,
Deputy.

Endorsed: Transcript from U. S. Dist. Court. Filed July 10th, 1856. GEO. PEN JOHNSTON,
Clerk.

And now at this day, that is to say, on the second day of May, 1856, came the said John W. Brittan, appellant, by his proctors, Ely and Rankin, and filed in this Court a certificate of the clerk of the District Court aforesaid, in these words, that is to say:

Certificate of Clerk of District Court.

DISTRICT COURT OF THE UNITED STATES
for the Northern District of California.

JOHN W. BRITTAN, Libellant and Appellant,
vs.
SHIP "ALBONI" and owners, Appellees.

In Admiralty.

I, John A. Monroe, clerk of the said Court, do hereby certify that an appeal has been made and perfected from the final decree of this Court to the Circuit Court of the U. S. for the District of California.

Witness my hand and the seal of said Court, this first day of May, A. D. 1856.

JOHN A. MONROE,
Clerk.
By W. H. CHEVERS,
Deputy.

Endorsed: Filed May 2d, 1856.

GEO. PEN JOHNSTON,
Clerk.

And afterwards, to wit, on the fourteenth day of July, 1856, came William A. Barnaby, claimant of ship Alboni, respondent, by his proctor, Julius K. Rose, and entered his appearance in these words, that is to say:—

Notice of Appearance.

U. S. CIRCUIT COURT.

In Admiralty.

JOHN W. BRITTAN, Appellant,
vs.
WILLIAM A. BARNABY, Respondent.

The clerk will please enter my appearance for the respondent, July 14, 1856.

JULIUS K. ROSE,
Proc. for Respondent.

Endorsed: Filed July 14th, A. D. 1856.

GEO. PEN JOHNSTON,
Clerk.

And afterwards, to wit, on the first day of September in the said September term, at the Court House in the City of San Francisco,

in the district aforesaid, an order for hearing was duly entered by the Judge of said Court in the words following, that is to say:—

Order for Hearing.

At a stated term of the Circuit Court of the United States of America for the Districts of California, held at the court room in the City of San Francisco, on Monday, the first day of September, in the year of our Lord one thousand eight hundred and fifty-six:

Present, The Hon. M. Hall McAllister, Judge of said Court.

JOHN W. BRITTAN
v.
SHIP "ALBONI," &c.

In Admiralty.

And now this day, on motion of Alexander Ely, Esq., Proctor for the Appellant, it is ordered that the hearing of this cause be set for Monday, the 15th day of September, A. D. 1856.

Endorsed: Filed this first day of September, 1856.

GEO. PEN JOHNSTON,
Clerk.

And afterwards, to wit, on the 18th day of December, in the said September term, the following stipulation and original bill of lading was placed upon file in said cause:—

Stipulation and Original Bill of Lading.

U. S. CIRCUIT FOR CALIFORNIA.

J. W. BRITTAN
v.
THE SHIP ALBONI.

It is hereby stipulated that the copy of the bill of lading in this case contained in the transcript be amended, by adding the words stamped on the original bill, as follows: "Goods to be delivered at the vessel's tackles when ready for delivery. Not accountable for breakage, leakage, or for loss or damage by fire or collision. Freight payable prior to delivery if required. Contents unknown:" and also that the original bill of lading and this stipulation be attached to and form part of the record.

ELY & RANKIN,
Proctor for Appellant.

J. K. ROSE,
Proctor for Respondent.

Endorsed: Filed this 18th day of December, A. D. 1856.

GEO. PEN JOHNSTON,
Clerk.

WM. STONE BOTTS,
Dep. Clerk.

210

Shipped in good order and well conditioned by J. B. Jones, on board the ship called the Alboni, whereof Barnaby is Master, now lying at the Port of NEW YORK, and bound for San Francisco. To say:

(90) Ninety bundles sheet iron,
(100) One hundred boxes tin plate,
(2) Two bundles Russia iron,
(3) Three casks zinc,
(3) Three pigs tin,
(15) Fifteen matts wire,
(1) One cask wire,

being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid Port of San Francisco (the dangers of the seas only excepted), unto J. W. Brittan, or to his assigns, he or they paying freight for the said as pr. margin, with 5 per cent. primage and average accustomed. In witness whereof, the Master or Purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated in New York, the 7th day of May, 1855.

W. A. BARNABY.

Schedule "B."

S—B. J.

17,625 @ ¾	$132	20
16,503 @ ⅝	103	15
	235	35
Primage	11	77
	$247	12

Endorsed: Circuit Court of the United States for the Districts of California. John H. Brittan *vs.* The Ship Alboni. Filed Dec'r 16th, 1856.

GEO. PEN JOHNSTON,
Clerk.

WM. STONE BOTTS,
Dep. Cl'k.

And afterwards, to wit, on the 24th day of December, in said September term, the following decree was ordered on file by the Judge of said Court aforesaid:—

Decree.

JOHN W. BRITTAN, Appellant,
v.
SHIP ALBONI, Appellee.

In Admiralty.

This cause came on to be heard at the present term of this Court on appeal from the decree of the District Court U. S. for the Northern District of California and transcript of the proceedings in the case, and the solicitors of the respective parties having been heard, it is ordered, considered, and adjudged that the decree of said District Court dismissing the libel in this case be, and the same is hereby affirmed.

M. HALL McALLISTER,
Judge, &c.

San Francisco, Dec. 24, 1856.

Endorsed: Filed this 24th Dec., 1856.

GEO. PEN JOHNSTON,
C.

CUTLER McALLISTER,
D. C.

And afterwards, to wit, on the 2d day of January, in said September term, the following consent and stipulation was agreed to by the said Julius K. Rose, Proctor for said Respondent:—

Consent.

U. S. CIRCUIT COURT,
Northern Dist. of California.

JOHN W. BRITTAN, Appellant,
v.
WILLIAM A. BARNABY, Master of Ship Alboni, Respondent.

In Admiralty.

The decree of the District Court having been affirmed on appeal by this Court on the 24th Dec., 1856: It is hereby stipulated that the said appellant may have ten days to the 15th January, 1857, inclusive, to prepare and serve the statement of evidence required by the rules of Court. Dated 27th Dec., 1856.

JULIUS K. ROSE,
Proctor for Respondent.

Endorsed: Filed Jan. 2d, A. D. 1857.

GEO. PEN JOHNSTON,
C.

CUTLER McALLISTER,
D. C.

210

Shipped in good order and well conditioned by J. B. Jones, on board the ship called the Alboni, whereof Barnaby is Master, now lying at the Port of NEW YORK, and bound for San Francisco. To say:

(90) Ninety bundles sheet iron,
(100) One hundred boxes tin plate,
(2) Two bundles Russia iron,
(3) Three casks zinc,
(3) Three pigs tin,
(15) Fifteen matts wire,
(1) One cask wire,

being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid Port of San Francisco (the dangers of the seas only excepted), unto J. W. Brittan, or to his assigns, he or they paying freight for the said as pr. margin, with 5 per cent. primage and average accustomed. In witness whereof, the Master or Purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated in New York, the 7th day of May, 1855.

W. A. BARNABY.

Schedule "B."

S—B. J.

17,625 @ $\frac{3}{4}$	$132	20
16,503 @ $\frac{5}{8}$	103	15
	235	35
Primage	11	77
	$247	12

Endorsed: Circuit Court of the United States for the Districts of California. John H. Brittan *vs.* The Ship Alboni. Filed Dec'r 16th, 1856.

GEO. PEN JOHNSTON,
Clerk.

WM. STONE BOTTS,
Dep. Cl'k.

And afterwards, to wit, on the 24th day of December, in said September term, the following decree was ordered on file by the Judge of said Court aforesaid:—

Decree.

JOHN W. BRITTAN, Appellant,
v.
SHIP ALBONI, Appellee.

In Admiralty.

This cause came on to be heard at the present term of this Court on appeal from the decree of the District Court U. S. for the Northern District of California and transcript of the proceedings in the case, and the solicitors of the respective parties having been heard, it is ordered, considered, and adjudged that the decree of said District Court dismissing the libel in this case be, and the same is hereby affirmed.

M. HALL McALLISTER,
Judge, &c.

San Francisco, Dec. 24, 1856.

Endorsed: Filed this 24th Dec., 1856.

GEO. PEN JOHNSTON,
C.

CUTLER McALLISTER,
D. C.

And afterwards, to wit, on the 2d day of January, in said September term, the following consent and stipulation was agreed to by the said Julius K. Rose, Proctor for said Respondent:—

Consent.

U. S. CIRCUIT COURT,
Northern Dist. of California.

JOHN W. BRITTAN, Appellant,
v.
WILLIAM A. BARNABY, Master of Ship Alboni, Respondent.

In Admiralty.

The decree of the District Court having been affirmed on appeal by this Court on the 24th Dec., 1856: It is hereby stipulated that the said appellant may have ten days to the 15th January, 1857, inclusive, to prepare and serve the statement of evidence required by the rules of Court. Dated 27th Dec., 1856.

JULIUS K. ROSE,
Proctor for Respondent.

Endorsed: Filed Jan. 2d, A. D. 1857.

GEO. PEN JOHNSTON,
C.

CUTLER McALLISTER,
D. C.

And afterwards, to wit, on the sixth day of January in said September term, the following agreement as to evidence was ordered placed on file by the respective proctors of the parties in this cause:—

Agreement as to Evidence.

U. S. Circuit
for the District of California.

John W. Brittan, Appellant,
v.
The Ship Alboni, her tackle, apparel, &c.
Wm. A. Barnaby, Claimant, Respondent.

In the above entitled suit it is agreed by the parties, appellant and respondents, that the testimony as embodied in the record, and upon which this cause was tried in this Court, be considered as a settlement statement of the testimony upon which the cause is to be tried in the Supreme Court of the United States, and with such additional testimony as the respective parties may be by law entitled to introduce before said Supreme Court.

It is also further stipulated by the parties that the matter in controversy in this suit exceeds the value of two thousand dollars.

San Francisco, *January* 3, 1857.

ELY & RANKIN,
Proctors for Appellant.
JULIUS K. ROSE,
Proc. for Resp'd't.

Endorsed: Filed January 6, A. D. 1857.
GEO. PEN JOHNSTON, *C.*
CUTLER McALLISTER, *D. C.*

And afterwards, to wit, on the same 6th day of January last mentioned came the said appellant, by his proctors and advocate, and filed in this Court the following Notice of Appeal to the Supreme Court of the United States:—

Notice of Appeal.

U. S. Circuit
for the District of California.

John W. Brittan, Appellant,
v.
The Ship Alboni, her tackle, apparel, &c.
Wm. A. Barnaby, Claimant, Respondent.

To the Honorable the Supreme Court of the United States.

The appeal of John W. Brittan, the above named libellant and appellant, respectfully showeth, that on the second day of November,

1855, he filed his libel in the District Court of the United States for the Northern District of California, against the ship Alboni, her tackle, apparel, &c., in a cause civil and maritime, for the recovery of the value of a certain quantity of goods and merchandise, shipped by libellant on board of said ship when in the port of New York, to be transported and delivered to said libellant at San Francisco in California, for a certain stipulated price, as per bill of lading, which the master and owners of said ship failed to do; and that the said ship was arrested upon process issued upon said libel, and was discharged on William A. Barnaby filing his claim and entering into stipulations: And the respondent filed his answer to said libel, and the libellant replied thereto, and such proceedings were had in the said cause, that, on the eighteenth day of April, 1856, a final decree was made and pronounced therein by the said District Court, that the libel be dismissed, with costs.

And that, after such final decree, your petitioner duly appealed therefrom to the Circuit Court of the United States for the District of California, and that the said cause was removed thereby in the said Circuit Court, and there tried anew; and such proceedings were had in the said Circuit Court, that afterwards, on the 24th day of December, 1856, the said Circuit Court made a final decree in the said cause, whereby it was decreed that the said decree of the District Court be in all things affirmed with costs, and that the said appellee have execution, and the stipulators cause their stipulations to be fulfilled; which said decree of the said Circuit Court is, as this appellant is advised, erroneous and ought to be reversed.

Wherefore, this appellant appeals from the whole of said decree of said Circuit Court to the Supreme Court of the United States, and respectfully prays that the decree of the said Circuit Court, and the libel, answer, pleadings, depositions, evidence, and all the proceedings in the said court may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the Circuit Court and every part thereof may be reversed, and a decree made giving to the libellant the amount claimed in the said libel, or such other decree as to the said Supreme Court shall seem just.

J. W. BRITTAN.

Dated San Francisco, January 3d, 1857.

ELY and RANKIN,
Proctors for Appellant.

ALEXANDER ELY,
Advocate.

Endorsed: Filed January 6, 1857.

GEO. PEN. JOHNSTON,
C.

CUTLER McALLISTER,
D. C.

And afterwards, to wit, on the 8th day of the month of January last, aforesaid, the following citation was duly issued by the judge of the said Court in the words following, that is to say:

Citation.

By the Honorable M. Hall McAllister, Judge of the Circuit Court of the United States for the District of California:

To William A. Barnaby.

Whereas, John W. Brittan has lately appealed to the Supreme Court of the United States, from a decree lately rendered in the Circuit Court of the United States for the District of California, made in favor of you, and as claimant of the ship Alboni, her tackle, apparel, &c., and has filed the security required by law: you are, therefore, hereby cited to appear before the said Supreme Court at the City of Washington, on the ninth day of March next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of San Francisco, in the District of California, the eighth day of January, in the year of our Lord one thousand eight hundred and fifty-seven, and of the Independence of the United States the eighty-first.

M. HALL McALLISTER.
Judge, &c.

Endorsed: Filed this 8th Jan'y, A. D. 1857.

GEO. PEN. JOHNSTON,
C.

CUTLER McALLISTER,
D. C.

And afterwards, to wit, on the 12th day of the month of January last aforesaid, was filed in this Court said respondent's admission of service by his proctor, in the words following, that is to say:—

Admission of service of Notice of Appeal and Citation.

U. S. CIRCUIT COURT
for the District of California.

JOHN W. BRITTAN, Appellant,

vs.

THE SHIP ALBONI, her tackle, apparel, &c., WILLIAM A. BARNABY, Claimant, Respondent.

We hereby admit due personal service of a copy of the appeal and citation filed in this cause in the Circuit Court Clerk's office.

San Francisco, January 9, 1857.

JULIUS K. ROSE,
Proctor for Resp'ts.

Endorsed: Filed this 12th Jan'y, 1857.

GEO. PEN. JOHNSTON,
C.

CUTLER McALLISTER,
D. C.

Clerk's Certificate.

I, George Pen. Johnston, Clerk of the Circuit Court of the United States for the District of California, in and for the Northern District thereof, do hereby certify the foregoing pages, from one to seventy-five, inclusive, to be a transcript of the record of the said Circuit Court, in the cause named at the beginning hereof, being true copies of the original papers on file herein.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court, this nineteenth day of January, in the year of our Lord one thousand eight hundred and fifty-seven, and of our Independence the eighty-first.

[SEAL.] Attest, GEO. PEN. JOHNSTON.
By CUTLER McALLISTER,
D. C.

No. 157.

N. CALIFORNIA, C. C. U. S.

JOHN W. BRITTAN, App't,
vs.
WILLIAM A. BARNABY, Claimant of the ship "ALBONI."

Filed 14th November, 1857